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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

Master File No. 3:07-cv-5944 JST
MDL No. 1917

This Document Relates to:

All Indirect-Purchaser Actions

**OBJECTIONS TO REPORT AND
RECOMMENDATION OF SPECIAL
MASTER RE MOTIONS (1) TO
APPROVE INDIRECT PURCHASER
PLAINTIFFS' SETTLEMENTS AND (2)
FOR AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF LITIGATION
EXPENSES, AND INCENTIVE AWARDS
TO CLASS REPRESENTATIVES**

Hearing Date: March 15, 2016
Time: 2:00 p.m.
Courtroom: 9, 19th Floor
Judge: Honorable Jon S. Tigar

OBJECTIONS TO REPORT AND
RECOMMENDATION OF SPECIAL MASTER

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1 I. INTRODUCTION

2 The undersigned object to the Special Master's Report and Recommendations ("R&R") on
 3 the grounds that the proposed settlements are not fair, reasonable, and adequate because: (1)
 4 releasing the claims of the class members in "non-repealer" states is improper; (2) the notice
 5 program was flawed; (3) the award of a percentage-of-the-fund as attorneys' fees is unwarranted
 6 in this case. Further, the Special Master ignored objections to the expense award, failed to address
 7 compliance with the Northern District's guidance on class action settlement procedures, and
 8 improperly relied upon communications and material not available to this Court and the parties.

9 II. RELEASING CLAIMS OF NON-REPEALER-STATE CLASS MEMBERS 10 WITHOUT CONSIDERATION IS ERROR

11 It is undisputed that Lead Counsel negotiated these settlements on the assumption that the
 12 claims of over one-half of the Nationwide Class have zero value because they arise in states that
 13 have adopted *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) ("non-repealer" states").
 14 Therefore, the proposed settlements release all claims for non-repealer state class members
 15 without any consideration at all. However, the primary claims of these class members are federal
 16 equitable claims that **do not arise under state law, and do not present any *Illinois Brick* issues.**
 17 Rather, they are claims that were asserted under Section 16 of the Clayton Act, 15 U.S.C. § 26, on
 18 behalf of all a putative nationwide litigation class. *See* IPP 4th Consol. Am. Cmpl. (Dkt. 1526) ¶¶
 19 5, 247-256 ("First Claim for Relief: Violation of Section 1 of the Sherman Act").

20 The law has been well-settled since the Third Circuit decided *Midwest Paper Prods. Co. v.*
 21 *Cont'l Group*, 596 F.2d 573, 594 (3d Cir. 1979), that the concerns expressed in *Illinois Brick* have
 22 no relevance to indirect purchasers seeking relief under Section 16 for Sherman Act violations.
 23 *See, e.g., United States Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003) ("the
 24 direct-purchaser doctrine does not foreclose equitable relief").

25 A. The Claims of the Non-Repealer State Members of the Nationwide Class are 26 Not Being Settled – They Are Being Dismissed With Prejudice

27 There are no factual differences between repealer and non-repealer state members of the
 28 Nationwide Class. All have alleged the identical predicate for their claims, *i.e.*, that the Settling

Defendants fixed prices of cathode ray tubes, causing them to pay illegally high prices for CRT products. *See, e.g.,* R&R, Dkt. 4351 at 26 and 28. As the Special Master found, the sole factor distinguishing members of the Nationwide Class who are slated to receive compensation from those whose claims are being dismissed without consideration is whether a particular class member purchased in a “repealer” or “non-repealer” state. R&R, Dkt. 4351 at 40. (A “repealer state” is one whose judiciary or legislature has declined to follow *Illinois Brick*.) With three exceptions, all repealer state purchasers are members of one of 22 statewide damage settlement classes to whom all of the settlement proceeds will be paid. For them, certification of the Nationwide Class serves absolutely no purpose. The Nationwide Class is solely a vehicle for delivering the releases of non-repealer state class members’ claims. No other case comes to mind where millions of people are being brought into a “settlement” class for the sole purpose of having their unadjudicated and uncompensated claims dismissed with prejudice.

A guiding principle of class action law is that “a class action settlement is a private contract negotiated between the parties.” *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005). *See also, In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, “the starting point for interpreting settlement agreements is general contract-law principles.” *Anderson v. Beland (In re Am. Express Fin. Advisors Secs. Litig.)*, 672 F.3d 113, 136 (2d Cir. 2011). The exchange of consideration is fundamental to contract formation. *See, Restatement (Second) of Contracts*, § 71. While it is true that the adequacy of consideration in a class action is analyzed on the exchange between the defendants and the class as a whole, here, the only consideration offered is not being given to the Nationwide Class, but to the members of **different** classes – the repealer state-wide damage classes. The fact that the Nationwide Class is defined to include persons in these 22 other classes does not mean that there is settlement consideration flowing to the Nationwide Class as a whole. This makes their releases essentially a dismissal with prejudice, without due process, not a settlement.

B. The Special Master Failed to Properly Recognize and Value the Federal Equitable Claims

The Special Master analyzed the fairness of the settlements (and the plan of distribution)

1 almost exclusively from the perspective of whether Nationwide Class members' **state law**
 2 monetary claims have value. He dismissed with only cursory consideration the proposition that
 3 valuable federal law claims are being released. This analysis is incorrect.

4 **1. The Claims for Equitable Monetary Relief**

5 Common law and statutory interpretation have long provided that where a person is
 6 entitled to invoke the equitable jurisdiction of a federal court, such court possesses inherent
 7 powers to fashion and afford that litigant the full measure of relief available at equity, including
 8 monetary remedies such as restitution and disgorgement. Thus, statutes, including Clayton Act,
 9 Section 16, that authorize an injunction to compel or forestall behavior, have been construed to
 10 trigger the availability of a much broader range of equitable relief. This concept is neither new,
 11 nor controversial. The Supreme Court's seminal decision is *Porter v. Warner Holding Co.*, 328
 12 U.S. 395 (U.S. 1946), where a World War II price control law authorizing injunctive relief was
 13 construed to encompass an order for the defendant to disgorge illegal rents. The Court held that
 14 unless otherwise explicitly restricted by statute, District Courts may exercise all inherent equitable
 15 powers to fashion relief, including ordering the payment of money (*id* at 387-99):

16 Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied
 17 or limited in the absence of a clear and valid legislative command. Unless a
 18 statute in so many words, or by a necessary and inescapable inference, restricts
 19 the court's jurisdiction in equity, the full scope of that jurisdiction is to be
 20 recognized and applied. * * * [W]here, as here, the equitable jurisdiction of the
 21 court has properly been invoked for injunctive purposes, the court has the power
 22 to decide all relevant matters in dispute and to award complete relief even though
 23 the decree includes that which might be conferred by a court of law. *Alexander v.*
 24 *Hillman*, 296 U.S. 222, 241-242.

25 Relying on *Porter*, the Ninth Circuit similarly construed Section 13(b) of the Federal Trade
 26 Commission Act (which authorizes the FTC to seek injunctions against practices that violate laws
 27 enforced by the Commission), holding that a request for injunctive relief is sufficient to trigger the
 28 full panoply of a District Court's equitable powers, including restitution. *FTC v. H. N. Singer,*
Inc., 668 F.2d 1107, 1112 (9th Cir. 1982). Numerous other Circuit Courts of Appeal have agreed.
See, e.g., FTC v. Amy Travel Service, Inc., 875 F.2d 564, 571-72 (7th Cir.), *cert. denied*, 493 U.S.
 954, (1989); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-19 (5th Cir.), *cert. denied*, 456

1 U.S. 973, (1982); *FTC v. United States Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir.
 2 1984), *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468-469 (11th Cir. 1996); and *FTC v.*
 3 *Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). In *Mitchell v. Robert*
 4 *DeMario Jewelry, Inc.*, 361 U.S. 288, 289 (1960), the Supreme Court confirmed that the Fair
 5 Labor Standards Act authorized reimbursement of lost wages, relying exclusively on language
 6 granting courts authority "to restrain violations of [the FLSA]."

7 In 2011, the Southern District of New York applied this rationale to provide the federal
 8 government with disgorgement as ancillary equitable relief under Section 4 of the Clayton Act for
 9 antitrust violations. *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 639 (S.D.N.Y. 2011).
 10 The *Keyspan* court (*id.*, at 639-640) held that equitable disgorgement is particularly in harmony
 11 with principles of antitrust law:

12 [D]isgorgement comports with established principles of antitrust law. When
 13 fashioning a consent decree in an antitrust action, district courts "are invested
 14 with large discretion to model their judgments to fit the exigencies of the
 15 particular case." *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242,
 253, 79 S. Ct. 245, 3 L. Ed. 2d 270 (1959) (quotations omitted).

16 See also *United States v. Grinnell Corp.*, 384 U.S. 563, 577, 86 S. Ct. 1698, 16 L. Ed. 2d 778
 17 (1966) ("[A]dequate relief in a monopolization case should put an end to the combination and
 18 deprive the defendants of any of the benefits of the illegal conduct . . ."). Disgorgement
 19 accomplishes that goal.

20 Later that year, Judge Illston of this Court ruled that an indirect-purchaser private litigant
 21 seeking equitable relief under Section 16 of the Clayton Act could also obtain disgorgement of the
 22 defendants' ill-gotten gains, *Oregon v. AU Optronics Corp. (In re TFT-LCD (Flat Panel)*
 23 *Antitrust Litig.*), MDL No. 1827, No. C 10-4346 SI, 2011 U.S. Dist. LEXIS 76562, 2011 WL
 24 2790179 (N.D. Cal. July 11, 2011). In 2013, Judge Charles B. Renfrew (Ret.), acting as a Special
 25 Master in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, Master File No.
 26 M-02-1486-PJH (MDL No. 1486), 2013 U.S. Dist. LEXIS 188116 at *190, *207 (N.D. Cal. Jan.
 27 8, 2013) found that both repealer and non-repealer state indirect purchasers in a nationwide
 28 settlement class had alleged colorable federal equitable monetary claims for restitution and

1 disgorgement. This finding, adopted by Chief Judge Hamilton, formed part of the basis for class
 2 certification and a plan of distribution that paid DRAM claimants *pro rata* without regard to
 3 repealer or non-repealer state status. *DRAM* at *339-40.

4 Recently, Chapter 23 of the 2015 edition of the California State Bar's Antitrust and Unfair
 5 Competition Law Treatise added a discussion of the availability of disgorgement as a remedy
 6 under a court's inherent equitable powers:

7 Under federal law, disgorgement of profits may take various forms. Thus, for
 8 example, where injunctive relief is not available (such as where it is moot),
 9 disgorgement of *all* profits of a company engaged in illegal conduct (as opposed to
 10 the damages or overcharges resulting from the illegal conduct) is particularly
 11 appropriate (*see Kansas v. Nebraska*, 135 S. Ct. 1042, 1056-59 (2015)), * * *
 Where injunctive relief is available, disgorgement of profits and overcharges
 arising from the illegal conduct is available as *ancillary* relief that can be obtained
 in addition to any other remedies, such as an order barring future misconduct by a
 defendant. [Citations omitted.]

12 The Treatise is available on LEXIS at 1-23 CA Antitrust and Unfair Competition Law § 23.02.

13 The Special Master improperly found that no viable claim for disgorgement could be made
 14 here. He dismissed *Keyspan* and *TFT-LCD* on the grounds that “[b]oth these cases involve
 15 government enforcement efforts and are thus distinguishable for the private indirect purchaser
 16 action here.” R&R, Dkt. 4351 at 44. That statement is factually incorrect with regard to *TFT-*
 17 *LCD*, where the State of Oregon was not exercising its police powers, but was in federal court as a
 18 private plaintiff. As Judge Illston noted, “Oregon brought suit on behalf of itself, ‘its agencies,
 19 political subdivisions, and local governments, and all natural persons residing in Oregon who were
 20 indirect purchasers of . . . products containing LCD panels . . .’ See Complaint, ¶1.” *TFT-LCD*
 21 (*Flat Panel*) *Antitrust Litig.*, 2011 U.S. Dist. LEXIS at *52. Moreover, equitable monetary relief
 22 is available under a District Court’s inherent powers, which are not contingent on the identity of
 23 the plaintiff. Rather, as Judge Illston found, “[b]ecause chancery courts possessed the power to
 24 order equitable disgorgement in the eighteenth century” therefore, “contemporary federal courts
 25 are vested with the same authority by the Constitution and the Judiciary Act.” *Id* at *61.

26 The Special Master ignored Judge Hamilton’s adoption of Judge Renfrew’s R&R in
 27 DRAM because he misconstrued the references to equitable monetary relief as applying solely to
 28 state law consumer protection claims. R&R, Dkt. 4351 at 45. However, Judge Renfrew was

1 clearly addressing “all injunctive claims,” highlighting those asserted “under the federal antitrust
 2 laws, including the entire range of relief that can be obtained as part of such claims [citing
 3 *Keyspan, supra*, and *TFT-LCD, supra*].” Moreover, he explicitly found that “[u]nder the
 4 particular facts and circumstances of this case, the injunctive claims are *sufficiently viable* such
 5 that the certification of a nationwide class under Rule 23(b)(2) in order to execute a global release
 6 is appropriate.” *DRAM, supra*, 2013 U.S. Dist. LEXIS 188116, at *190 (emphasis added).

7 **2. The Claims for Injunctive Relief**

8 The Special Master found that because CRTs are an outmoded technology, “the
 9 unlikelihood of future violations makes an injunction basically worthless and probably impossible
 10 to obtain.” R&R, Dkt. 4351, at 42-43. He also dismissed an injunction requiring antitrust
 11 compliance training as having “little practical value to the class” because it would occur “20 years
 12 after this conspiracy began.” Both of these findings contain non-sequiturs. Even if defendants are
 13 not selling CRT televisions or monitors in the United States, they are still doing business here with
 14 the same executives and sales departments that master-minded the CRT conspiracy (and, for some,
 15 the LCD and DRAM conspiracies). The defendants haven’t dissolved, they are just marketing
 16 other products. Surely, employee antitrust education and injunctions requiring compliance with
 17 U.S. law would assist in preventing future anticompetitive abuses. *See, e.g., United States v.*
 18 *Apple, Inc.*, No. 12 Civ. 2826, 3396 (DLC), 2015 WL 5970345 (S.D.N.Y. Oct. 13, 2015).

19 The Attorney General of California believes that injunctive relief against these defendants
 20 is both available and valuable. In its proprietary and *parens patriae* litigation, California has
 21 obtained stipulated injunctions enjoining these defendants from engaging in illegal conduct with
 22 regard to all display screens, not simply CRT technology, as well as requiring antitrust compliance
 23 training across all product lines. (See, accompanying Request for Judicial Notice of California
 24 settlement documents.) Similar remedies are available to the Nationwide Class here.

25 **C. This Court’s Awarding Disgorgement Would be Appropriate**

26 The unspoken assumption underlying the Special Master’s R&R is that *Illinois Brick*
 27 articulates a public policy of hostility to any monetary compensation for indirect purchasers
 28 victimized by antitrust violations. Allegedly, any such remedy for consumers, including equitable

1 relief, is suspect as an attempt to circumvent or “end run” *Illinois Brick*. This assumption has been
2 made in two reported decisions by district courts in Maine and the District of Columbia.
3 However, neither court considered whether *Illinois Brick* constituted the “clear and valid
4 legislative command” required by *Porter, supra*, 328 U.S. at 399, to constrain a federal court’s
5 general ancillary equitable powers. *See, FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 41 (D.D.C.
6 1999) (*Illinois Brick* would foreclose disgorgement to indirect purchasers because it “raise[s] the
7 specter of duplicative recoveries”); and *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*,
8 350 F. Supp. 2d 160 (D. Me. 2004), (where the *Illinois Brick* bar to recovery was not even
9 contested: “Certainly no restitutionary remedy can escape the limitations . . . [of] *Illinois Brick*,
10 and the plaintiffs do not argue that it can”). Both of these cases and the R&R here are based on an
11 incorrect reading of the policy considerations underlying *Illinois Brick*.

12 Neither the purpose nor the rationale of *Illinois Brick* is disenfranchising indirect
13 purchasers or insulating price-fixers from their reach. As the Third Circuit, *en banc*, recognized in
14 *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 313 (3rd Cir. 2011), the direct-purchaser rule of
15 *Illinois Brick* “does not reflect a categorical policy judgment that indirect purchasers do not merit
16 antitrust protection.” Rather, *Illinois Brick* is essentially a rule of evidence, arising from
17 “prudential concerns for manageability,” and applicable only to the proof of damages recoverable
18 under Section 4 of the Clayton Act. *Id.* at 313-314, 316-317.

19 The equitable remedies of restitution and disgorgement do not trigger the need to
20 adjudicate complex economic forces that determine what portion of an illegal overcharge moves
21 down a product’s chain of distribution. This is what the Supreme Court sought to banish through
22 the “direct purchaser rule,” and the *Illinois Brick* Court had no objection to indirect purchasers
23 obtaining monetary relief as long as these matters will not burden federal courts. *Illinois Brick*
24 itself invites “end-runs,” carving out exceptions where the complexity of proof would be
25 demonstrably lessened, such as pre-existing cost-plus contracts, cases “where the direct purchaser
26 is owned or controlled by its customer,” and other “situation[s] in which market forces have been
27 superseded.” *Illinois Brick, supra*, 431 U.S. at 736 and n. 16. Nothing evidences the Supreme
28 Court’s lack of intent to foreclose monetary recovery by consumers more than its reversal of the

1 Ninth Circuit’s pre-emption ruling in *California v. ARC America Corp.*, 490 U.S. 93 (1979). The
 2 Supreme Court was offered the ultimate circumvention of *Illinois Brick* – an amendment of the
 3 Cartwright Act to explicitly permit recovery of pass-on damages – and decided that the
 4 amendment was not pre-empted. *ARC America* rejected each of the Ninth Circuit’s reasons for
 5 pre-empting the Cartwright Act, including the rationale of *FTC v. Mylan Labs, supra*, that indirect
 6 purchaser recovery would “subject antitrust defendants to multiple liability, in contravention of the
 7 ‘express federal policy’ condemning multiple liability.” *Id.* at 104-105. *Illinois Brick* is not
 8 evidence of a clear legislative command to remove restitution and disgorgement from this Court’s
 9 arsenal of equitable remedies in indirect purchaser litigation.

10 Although the Special Master invalidated the Nationwide Class’s equitable monetary claims
 11 solely on *Illinois Brick* grounds, a brief discussion of whether these are “forward looking
 12 remedies” is appropriate. *In re Multidistrict Vehicle Air Pollution Litigation*, 538 F.2d 231, 233-
 13 34 (9th Cir. 1976), is a Ninth Circuit decision, and, as the *Mylan Labs* Court noted (62 F. Supp2d
 14 at 40), “the sole [appellate] opinion addressing restitution and/or disgorgement under § 16.”
 15 There, in what is arguably dicta in “a somewhat confusing opinion,” the Ninth Circuit described
 16 restitution and disgorgement as beyond the purview of Section 16 because they are not directed at
 17 “threatened loss or damage.” *Ibid.* However, the facts of *Air Pollution* make it self-limiting, and
 18 as the *Mylan* Court observed: “[the Ninth Circuit’s] language suggests that a typical restitution or
 19 disgorgement scenario might fit within the contours of § 16, such as where plaintiffs seek to
 20 deprive antitrust violators of the benefits of their illegal conduct.” *Ibid.* The *Mylan* Court did not
 21 attempt to resolve this question, instead basing its denial of the remedies on *Illinois Brick*.

22 Section 16 of the Clayton Act provides for equitable relief directed to preventing future
 23 anticompetitive harm. The Supreme Court in *Porter, supra*, 328 U.S. 395, 400, resolved any
 24 doubt that restitution and disgorgement play such a role when it held that providing restitution or
 25 disgorgement “may be considered as an order appropriate and necessary to enforce compliance”
 26 with a statute. “Future compliance may be more definitely assured if one is compelled to restore
 27 one’s illegal gains.” *Ibid.* See also, *Kansas v. Nebraska*, 135 S. Ct. 1042, 1058 (2015)
 28 (“disgorgement will serve to stabilize a compact by conveying an effective message to the

breaching party that it must work hard to meet its future obligations”).

The Special Master’s conclusion that the non-repealer state class members’ equitable claims have zero settlement value is only proper if controlling law clearly foreclosed such relief. Neither *Illinois Brick* or *Air Pollution* does so. Re-allocation of the settlement proceeds across the entire Nationwide Class cannot cure this problem because the record is clear that the settlement consideration was negotiated solely as compensation for overcharges to the 22 state damage classes. The proposed settlement should be denied final approval.

III. THE NOTICE PROGRAM FAILED TO PROVIDE ADEQUATE NOTICE TO AN ACCEPTABLE PERCENTAGE OF CLASS MEMBERS

Objections were raised to the adequacy of the notice plan (Dkt. 4115 at 3-4), particularly, the demographic audience targeted and the notice administrator’s calculation of the percentage of that target actually reached. Dkt. 4364 at 33-37. In response, the notice administrator (Mr. Fisher) lodged a supplemental declaration defending his target demographic and contending that the calculated reach of his “digital notice” was accurate. Dkt. 4368 at 1-8. Mr. Fisher’s supplemental declaration included, for the first time, examples of the “digital notices” displayed on the Internet. *Id* at 8. The Special Master relied upon this declaration to recommend overruling all objections to the notice program. R&R, Dkt. 4351 at 54-59.

Under the Constitution, if notice is a person’s due, due process requires proper notice. Rule 23(c)(2)(B), specifies that notice to class members “must clearly and concisely state . . . (i) the nature of the action; (ii) the definition of the class certified; (ii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment.” The paid print notice plan satisfied the Rule 23(c)(2)(B) requirements. The digital “banner ads” did not. Dkt. 3863-3. No T.V. notice was provided. Thus, only the Rule 23-compliant paid print publication is notice.

According to Mr. Fisher, publication of the court-approved short-form notice reached 57% of the targeted demographic (*i.e.*, persons aged at least 30 who own TVs or computers with a household income of at least \$60,000). Dkt. 4371 at 13, ¶ 18 c. This level of reach is inadequate

1 to satisfy due-process. “The lynchpin in an objective determination of the adequacy of a proposed
 2 notice effort is whether all the notice efforts together will reach a high percentage of the class. It
 3 is reasonable to reach between 70-95%.” Judges’ Class Action Notice and Claims Process
 4 Checklist and Plain Language Guide (“Notice Checklist”), Federal Judicial Center (2010), at 3
 5 ([http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf)). *See also, Walter*
 6 *v. Hughes Communications, Inc.*, No. 09-2136-SC, 2011 WL 2650711 at *15 (N.D. Cal. July 6,
 7 2011) (citing “Notice Checklist” in rejecting a proposed notice plan as inadequate).

8 To augment the inadequate publication reach, Mr. Fisher undertook a digital advertising
 9 campaign. Dkt. 4371 at 10, ¶ 11. These banner ad, which Mr. Fisher equates with notice, were
 10 never submitted to the Court and are not Rule 23-compliant. Nonetheless, Mr. Fisher combines
 11 this digital “notice” with the print notice to achieve an alleged 83% reach of the targeted
 12 demographic. *Id* at 14, ¶ 18 d. Mr. Fisher’s supplemental declaration put exemplars of the banner
 13 ads into the record for the first time. The briefest asks: “Did YOU have a Cathode Ray Tube TV
 14 or Computer Monitor? CRTclaims.com.” *See* Dkt. 4368 at 8. The lengthiest states: “Did YOU
 15 have a Cathode Ray Tube TV or Computer Monitor? FILE A CLAIM! \$576 Million, Learn More
 16 CRT Claims.com, Authorized by U.S. District Court.” *Id*. While the banner ads may encourage
 17 the submission of claims, they do not contain the information required by Rule 23(c)(2)(B). The
 18 Special Master denied the undersigned the opportunity to point out that these ads are not Rule 23-
 19 compliant notice. Dkt. 4367 at 13. The most that can be said is that a Court-approved notice
 20 reached 57% of the targeted demographic. This level of reach does not demonstrate that the notice
 21 program was the best notice practicable under the circumstances.

22 “Where notice to a class has been inadequate, it may be appropriate to reject the
 23 settlement in its entirety.” *Kaufman v. Am. Express Travel Related Services, Inc.*, 283 F.R.D. 404,
 24 408 (N.D. Ill. 2012). The *Kaufman* Court observed that a weak notice program, combined with a
 25 “very low” response rate, put the grant of final approval in jeopardy. The little claims information
 26 in this record is that a total of 109,709 timely claims have been received. By comparison, this is
 27 47% of the 233,473 valid claims after audit in *TFT-LCD*. Dkt. 4403-1, Ex. A, ¶7. Instead of
 28 denying final approval, the *Kaufman* Court appointed an expert in class notification to recommend

1 additional steps to notify the class. *Kaufman v. Am. Express Travel Related Services, Inc.*, No. 07-
 2 C-1707 (N.D. Ill. Aug. 8, 2012) (Dkt. 398) (minute order appointing Todd Hilsee of Hilsee
 3 Group). Dkt. 4403-1, Ex. B. In the event the Court does not disapprove the proposed settlements,
 4 the undersigned respectfully renew the suggestion made initially to the Special Master, that one of
 5 the two nationally-recognized experts considered by the *Kaufman* Court be engaged to provide
 6 recommendations on how to make the notice here Rule 23-compliant.

7 **IV. THE SPECIAL MASTER ERRED IN AWARDING A PERCENTAGE-OF-THE-**
 8 **FUND AS ATTORNEYS' FEES, AND FAILED TO PROPERLY ADJUST THE**
 9 **LODESTAR FOR WORK THAT DID NOT BENEFIT THE CLASS**

10 The R&R largely agrees with the undersigned's objections regarding fees. The Special
 11 Master found excess billing (R&R, Dkt. 4351 at 80), problematic record-keeping practices (*id.* at
 12 79), dubious staffing decisions (*id.* at 80), and a "rocky" relationship with the California AG (*id.* at
 13 81). He therefore declined to recommend the 33.3% Lead Counsel requested. In light of the
 14 Special Master's findings, the proper approach would be to adjust the lodestar to reflect a
 15 reasonable number of hours. *See In re High-Tech Employee Antitrust Litig.*, Case No. 11-CV-
 2509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015).

16 **A. The Special Master Erred In Applying The Percentage-Of-The-Fund Method**

17 The Special Master applied a percentage-of-the-fund approach to determine the aggregate
 18 award, but intends to use a more-searching lodestar method to allocate that award to individual
 19 firms, noting that at that time, he will perform a "more meticulous scrutiny to each firm's billing
 20 [and] will take note of a particular firm's inefficiency, inexperience or bad judgment." R&R, Dkt.
 21 4351 at 63. But if time is not compensable in an allocation proceeding, how can it be used to
 22 support an aggregate fee award? These are not hypothetical concerns. The Special Master
 23 observed that "[t]hirteen firms did virtually nothing, billing less than \$75,000 each. Another
 24 nineteen firms billed less than \$1 million. Thus, the real work of the case was limited to about
 25 sixteen firms that billed over \$2 million." *Id.* at 80. Though he recommended less than sought,
 26 that \$19 million reduction is insufficient to address the non-compensable time identified.

B. The Special Master Failed To Apply An Appropriate Fee Reduction Based On Billing Records

The R&R confirms the existence of questionable billing practices, conceding that block-billing “occurred,” “but not to any egregious extent.” R&R, Dkt. 4351 at 81. As to quarter-hour increments, the Special Master opined that “this is also a common practice that *O’Bannon* said had been allowed by courts in the Ninth Circuit.” *Id.* However, reliance on *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 2015 WL 4274370 at *6 (N.D. Cal. July 13, 2015), is misplaced. The *O’Bannon* court ultimately rejected a reduction due to block billing because the entries were “adequately detailed to permit the Court to assess the reasonableness of the hours expended.” *Id.* at *7. The Special Master did not make such a finding. The *O’Bannon* court did not “bless” quarter-hour billing, but applied a 5% reduction to all such entries. *Id.* at *8.

The Special Master did apply a 10% across-the-board lodestar reduction not attributed to any particular billing practice (R&R, Dkt. 4351 at 81-82). This was error. Courts generally apply separate reductions in excess of 10% to problematic billing practices. *See, e.g., Apple, Inc. v. Samsung Electronics Co.*, 2012 WL 5451411, at *5 (N.D. Cal. Nov. 7, 2012) (“in light of the evidence that block-billing inflates hours by between 10% and 30%, the court trims 20% from the block-billed hours in Samsung’s request”); *Hajro v. U.S. Citizenship & Immigration Servs.*, 900 F.Supp.2d 1034, 1053 (N.D. Cal. 2012) (“the court exercises its discretion to reduce the hours for these block-billed entries by twenty percent, the amount noted by the Ninth Circuit as the middle range for time increases that occurs through block-billing”). In addition to block billing and quarter-hour increments, and perhaps more troublingly, the Special Master observed that there is “evidence of unnecessary duplication of effort (multiple lawyers attending a deposition, excessive number of document reviewers, etc.).” R&R, Dkt. 4351 at 80. Although he acknowledged all of the problems with the billing records, the Special Master failed to appropriately reduce the claimed lodestar. This was error.

C. The Special Master Failed To Apply An Appropriate Fee Reduction For Duplicative Trial Preparation

Lead Counsel decided to associate three additional firms as “trial counsel” on the eve of trial. The Special Master observed that “[t]he trial preparation that these three firms did would

1 have had to be done by some other lawyers had they not been on board.” *Id.* at 72. This
 2 observation, coupled with the Special Master’s conclusion that there is evidence of “unnecessary
 3 duplication of effort” (*id.* at 80), raises the probability that the class is being asked to pay for the
 4 same trial-preparation multiple time.

5 **D. The Special Master Failed To Apply An Appropriate Fee Reduction For**
 6 **Unnecessary Disputes With the California Attorney General**

7 Lead Counsel’s unusually contentious and “rocky” (R&R, Dkt. 4351 at 81) relationship
 8 with the California Attorney General is plain for all to see. In the latest chapter, the California AG
 9 was forced to file briefs challenging the adequacy of the notice plan and successfully move (over
 10 Lead Counsel’s opposition) to extend the claims-filing deadline. *See* Dkt 4339. The class is asked
 11 to compensate Lead Counsel for time spent creating an unnecessary conflict where none should
 12 have developed. The need for cooperation and coordination between the private plaintiffs’
 13 antitrust bar and the Attorneys General is a fact of life in consumer antitrust cases, and an
 14 important factor in the approval of any consumer settlement. *See, e.g., In re Toys ‘R’ Us Antitrust*
 15 *Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) (“participation of the State Attorneys General
 16 furnishes extra assurance that consumers’ interest are protected.”); *In re Lorazepam &*
 17 *Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) (citing same). Failure to reduce
 18 the fee award for the mismanagement of this vital relationship is error.

19 **V. THE SPECIAL MASTER FAILED TO ADDRESS OBJECTIONS TO EXPENSES,**
 20 **COMPLIANCE WITH THIS DISTRICT’S GUIDANCE ON CLASS ACTION**
 21 **APPROVAL, AND TO PROVIDE A COMPLETE RECORD TO THE COURT**

22 Several issues raised before the Special Master were not addressed in the R&R.
 23 Additionally, the Court and the parties do not seem to have a complete record of the documents
 24 upon which the R&R was based.

25 **A. The Special Master Failed To Address Objections To The Expense Request**

26 The Special Master recommends approval of \$7,634,372.50 in reimbursement of out-of-
 27 pocket expenses, stating that, “[n]o one has objected to approval of these expenses.” R&R, Dkt.
 28 4351 at 82-83. Moreover, \$4,495,878.02 of these expenses are described as “settlement proceeds”
 deducted from the early Chunghwa and LG settlement funds, and “placed in the Future Expense

1 Fund.” These monies do not appear to be out-of-pocket expenses, but funds that belong to class
 2 members. The undersigned objected to the reimbursement of the claimed expenses without a
 3 proper accounting. *See* Dkt. 4115 at 7-8.

4 **B. Lead Counsel and the Special Master Have Failed To Address This District’s**
 5 **Guidance On Class Action Approval**

6 Lead Counsel did not comply with the Northern District’s Procedural Guidance for Class
 7 Action Settlements, which directed him to include in his settlement approval papers, *inter alia*,
 8 “[t]he likely recovery per plaintiff under the terms of the settlement and the potential recovery if
 9 plaintiffs were to prevail on each of their claims.” Dkt. 4364 at 14-15; *see also* Dkt. 4194. The
 10 Special Master also failed to address these guidelines.

11 **C. The Special Master Relied On Documents And Communications Not In The**
 12 **Record**

13 At the January 5, 2016 hearing before the Special Master, the undersigned noted that
 14 emails containing the agenda for the hearing had not been disseminated to all counsel, and raised
 15 concerns regarding the protocols for communicating with the Special Master. *See* 1/5/16 JAMS
 16 Hearing Tr. at 118:15-23, Kirkham Decl., Dkt. 4402-1, Exhibit 1. The Special Master
 17 acknowledged this problem, concluding that “from now on any email exchange with me, either
 18 email or letter exchange with me should be posted on Case Anywhere on the JAMS website.” *Id.*
 19 at 119:13-15. The Special Master stated in his R&R that all proceedings before him have been
 20 filed on Case Anywhere “with a few inadvertent immaterial exceptions and routine e-mails about
 21 scheduling and other ministerial matters.” R&R, Dkt. 4351 at 21. However, that does not appear
 22 to be the case.

23 By way of example, a reference to “Alioto Ltr. Dtd. 1/7/16 to Special Master, e-filed at
 24 JAMS” appears in the R&R (R&R, Dkt. 4351 at 83), but no such letter was posted on the JAMS
 25 Case Anywhere site, nor is it one of the 19 document produced as exhibits in the Appendix of
 26 documents cited in the R&R filed with this Court. Dkts. 4363-4368. The R&R also states: “Lead
 27 Counsel have offered to provide the Special Master with all the backup expenses invoices, or to
 28 sample them. But given the review conducted by Lead Counsel, the lack of an objection and the
 cost-benefit calculation of investing that time, the Special Master declined to conduct a more in-

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Pursuant to Civil L.R. 5-1(i), the filer attests that the concurrence in the filing of this document has been obtained from each of the above signatories.